SUPREME COURT, U.S.
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No. 94-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,

Petitioner,

—v.—

VISA U.S.A. INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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VISA'S OPPOSITION CONFIRMS THAT THE TWO LEGAL ISSUES SQUARELY RAISED BY THIS CASE ARE OF BROAD IMPORTANCE AND ARE THE SUBJECT OF CLEAR CONFLICT IN THE LOWER COURTS.

Visa's brief in opposition serves only to confirm that this "landmark" case, which raises "significant legal issues," is worthy of plenary review.[1] Visa devotes the vast majority of its brief to rearguing the facts found against it by the jury and to arguing the legal merits of the decision below. The fact arguments are irrelevant, both now and at the merits stage, since the Tenth Circuit's reversal of the jury's verdict was entirely on legal grounds. Visa's merits arguments, on the other hand, simply underscore the broad importance of this case—and of the legal issues raised—both for the financial services industry and for the proper application of the antitrust laws to businesses throughout the country. In the end, there can be no doubt that the two central legal issues raised in this case are "important question[s] of federal law which [have] not been, but should be, settled by this Court." S. Ct. R. 10.1(c).

To be sure, Visa does offer a half-hearted denial that these two issues are the subject of conflicting decisions in the lower courts. Yet Visa's actual discussion glides past any serious analysis of the cases themselves (*see* Opp. 13-14, 26-27; *compare*

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[1] These descriptions of the case are not, as Visa suggests (Opp. 2), self-serving formulations "assert[ed]" by *Petitioner*, but rather are accurate quotations from a leading trade journal and a leading national newspaper. *See* Pet. 2. The importance of the issues at stake is underscored as well by the participation of businesses, *see* Briefs Amicus Curiae of the American Financial Services Ass'n and of American Express Travel Related Services Co., Inc., and consumer groups, *see* Briefs Amici Curiae of 27 National, State and Local Consumer Organizations and of the Center for Public Interest Research, *et al.*, as *amici curiae* in support of the petition. Underscoring the "landmark" status of this case further still is the large number of leading antitrust scholars who have closely followed the litigation and, in many instances, have published articles regarding the case and the issues it raises. These include individuals who have been retained by Dean Witter (*e.g.*, Carlton, Hovenkamp, Kauper, Kearl, Salop) and individuals who have been retained by Visa or its member banks (*e.g.*, Areeda, Baker, Baxter, Schmalensee). Numerous other antitrust commentators also have published articles recently on the subject matter of this case (*e.g.*, Balto, Blumenthal, Kattan, Perritt, Piraino).

Pet. 14-18, 23-26), and the existence of these important conflicts, as well as the pressing need for Supreme Court clarification, is repeatedly confirmed by Visa's own authorities, including nearly every one of the antitrust commentators upon whom Visa relies. Perhaps the most telling example is Balto, an FTC lawyer, who in a forthcoming article that Visa's opposition repeatedly cites (Opp. 5 n.3, 20 n.23) makes a veritable plea to the Court to grant *certiorari* in this case in order to clarify the present confusing state of the law. *See* Balto, *Access Demands to Payment Systems Joint Ventures*, 18 Harv. J.L. & Pub. Pol'y 636 (forthcoming June 1995) (repeatedly expressing the view that there is "a lack of clarity in the legal standards" governing joint venture membership rules (*id.* at 637, 681), that the current standards are "vague" (*id.* at 637) and "particularly cloudy" (*id.* at 651) and that this "lack of clarity" precipitates increased litigation over joint venture issues (*id.* at 681)). Balto's article concludes: "Joint ventures are an ever more essential facet of the economy; providing a clear, predictable standard for the risks [that joint ventures] face from access demands will enhance their ability to compete." *Id.* at 682.

Similarly, Baker, in an article funded by several Visa member banks, argues that analysis of joint venture restraints in the wake of "*Broadcast Music*, *Northwest Wholesale*, and *NCAA* . . . is little more than a jurisprudential bog," and concludes that "[h]opefully, with time, the Supreme Court will correct the anomalies and uncertainties infecting the question of compulsory access to network joint ventures." Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999, 1051-52, 1133 (Opp. 18 n.22). *See also* Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 962 (1993) (Opp. 19, 20) (noting that confusion about prior Supreme Court joint venture decisions "may still inhibit some efficiency-enhancing joint venture restrictions"); Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 807 (1992) (Opp. 23, 26 n.28) (noting "important questions remain" unresolved regarding market power under rule of reason, including "is [market power] an essential ingredient in antitrust cases, or merely one of several factors to be taken into account?" and "how one determines whether market power exists in a particular situation"); Blumenthal, *Three Vexing Issues Under the Essential Facilities*

Doctrine: ATM Networks as Illustration, 58 Antitrust L.J. 855, 856, 864-68 (1990) (Opp. 20) (noting "anomalies that may spell trouble as a matter of public policy" in leading cases relating to access to network joint ventures).

The lack of settled law on the questions presented is powerfully illustrated by Visa's brief in yet another way: with respect to the ancillary restraint issue Visa fails to cite a single opinion of the Court issued since 1912, and with respect to market power Visa cites only a decade-old case that poses but does not resolve the issue presented.

Recognizing that it cannot negate the existence of two decisive circuit splits, Visa falls back to the suggestion that these issues are not material to the holding of the Tenth Circuit and thus to the ultimate result in this case. As stated in the petition, however, and as shown more succinctly here, the Tenth Circuit's legal holdings on these two important issues of antitrust law were not only material to but determined the outcome of its errant decision. The Court therefore should grant the petition for a Writ of Certiorari on both issues.

A. The Standard for a Lawful Ancillary Restraint.

As explained in the petition (Pet. 13-14), in its quartet of joint venture cases decided between 1979 and 1986 the Court never encountered a suitable opportunity to provide meaningful guidance regarding the degree to which, under the rule of reason, a joint venture's restraint must relate to the venture's efficiencies. That issue, which is of substantial consequence to business planning across all sectors of the economy, especially in view of the growing popularity of joint ventures and other partial integrations, is the first question that Visa contends is not of sufficient importance to be settled authoritatively by this Court.

Visa starts with the unsupported claim that there is no "conflict in the circuits on the issue of ancillary restraints" (Opp. 13), but soon admits that the legal standard is "expressed in different words by different courts within as well as among the various circuits" (*id.* 14). Moreover, as the petition explains, what Visa attempts to pass off as "nuances of expression" (*id.*) are in fact decidedly different substantive legal standards. *See* Pet. 14-18. Visa's characterization is further belied by the numerous

courts and commentators that have noted the existence of a substantive conflict. *See supra*; Pet. 14, 16.

That the differing standards reflect fundamental *and dispositive* conflicts about the kinds of conduct that may be legal under the antitrust laws is perhaps best illustrated by this case. Had the Tenth Circuit actually examined whether Visa's exclusionary bylaw promotes the specific efficiencies of the network joint venture—in accordance with the standard typified by the D.C. Circuit (Pet. 14-15, 17)—it plainly would have reached the opposite outcome. *See* Pet. 19-21. Had the court gone a step further and required Visa to show that no less restrictive alternative could have achieved these same efficiencies—the test required by the First Circuit and others (Pet. 18)—it again would have been obliged to affirm the District Court.

Visa's other attempts to evade this irreconcilable split are still less persuasive. Visa's reliance on the fact that not all of the conflicting lower court cases were cited to the Tenth Circuit (Opp. 14) is baffling: Dean Witter was not obliged and would have been ill-advised to file *certiorari* papers as its merits brief in the Tenth Circuit. Visa does not suggest (nor could it) that Dean Witter failed to raise its legal argument concerning ancillarity below. *See* Brief of Appellee (10th Cir.) 22-36.

Visa also suggests that the legal standard for determining ancillarity is not really at issue in this case (Opp. 15), but the Tenth Circuit in fact focused directly on the issue, asking "is Bylaw 2.06 ancillary[?]"[2] App. 21a. In any event, as Visa later

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[2] Numerous other courts have likewise focused on the principle of ancillarity in joint venture membership cases. *See, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1102-03 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1252 (1995); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581-82 (11th Cir. 1991), *cert. denied*, 113 S.Ct. 295 (1992); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367 (5th Cir. 1980). Moreover, contrary to Visa's characterization (Opp. 15 n.18), *Terminal Railroad* did in fact focus on the ancillarity of the challenged restraint in terms of whether it increased the efficiency of the defendant venture. *See United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 405-08 (1912). *See also* Baker, *Compulsory Access, supra*, at 1022 (describing *Terminal Railroad* as "an opinion heavily—and most interestingly—leavened with efficiency analysis"). The other two cases that Visa cites do not contain

admits, the "relevant issue" is the same "whether phrased in terms of ancillary restraint principles or not." Opp. 15. However the issue is phrased, the standard employed by the Tenth Circuit deepens the split on the central legal question of the circumstances in which joint venture restraints of trade are justified.

By devoting the bulk of its discussion of ancillary restraints to the merits of the issue, Visa only reinforces the importance of plenary review by the Court. *See* Opp. 15-22. In particular, Visa argues in great detail for the adoption of a much broader view of "efficiency." Specifically, Visa would have courts consider "*ex ante* 'macro' efficiencies that depend upon general assumptions about the way the economy works." *Id.* 17. Accordingly, Visa argues that, in addition to the efficiencies of the joint venture whose conduct is in question, other "efficiencies" are relevant, such as protecting property rights generally and enhancing incentives for the formation of other joint ventures. *Id.* 17-20. These provocative policy arguments and others, such as that joint ventures should be treated the same as single firms under the antitrust laws (*id.* 17-18), are the basis of the approach adopted by the Tenth Circuit and would be very much at issue on the merits. They are plainly beside the point at the *certiorari* stage. For present purposes, the important point is that of the three ancillarity standards employed by the lower courts, only the one applied by the Tenth Circuit reaches Visa's desired result.[3]

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any suggestion that ancillarity was irrelevant because of the nature of the challenged restraints in those cases. *See Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982).

[3] By contrast, Visa's attempt to reargue its version of the facts relating to efficiency is, and will remain, entirely irrelevant. In light of the jury verdict, the Court would credit Dean Witter's version of the facts on plenary review. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990). In any event, Visa fails to mention several incontrovertible facts in the record that illustrate why the jury rejected Visa's factual case as pretextual. Thus, while Visa asserts that it excluded Dean Witter because Dean Witter is an intersystem competitor (Opp. 4, 7) whose admission would permit free riding (*id.* 16-17), undermine innovation incentives (*id.* 17-19) and make Visa "overinclusive" (*id.* 21), the jury heard evidence that: (i) Visa has chosen to be an "open" joint venture that admits hundreds of new members every year,

In sum, the ancillary restraint question poses core issues about how to apply the Sherman Act in cases involving challenges to joint venture restraints. It is of broad importance, presents a clear conflict in the lower courts and is dispositive in this case. This question thus merits plenary review here and an authoritative resolution by the Court.

B. The Role and Definition of Market Power.

Visa likewise claims that the market power question does not merit review, because there allegedly is "no meaningful conflict" on this issue and because it is a "false premise" that the Tenth Circuit employed "a market power 'screen' that was outcome determinative." Opp. 23.

Once again, however, Visa's subsequent argument undercuts its claim that this issue is not worthy of plenary review. Visa immediately launches into an extended merits argument premised on the controversial proposition that collective market share is not a proper indicator of Visa's market power even though Visa is acting as a collective entity in adopting and enforcing the challenged exclusionary bylaw. Opp. 23-25; *contrast* Pet. 26 n.19 (citing this Court's precedents that suggest the opposite). Leaving aside for now the debate as to whether Visa is right on the merits of this legal issue, it is plain that Visa's discussion actually provides additional support for plenary review of the market power approach in the decision below.

As with the ancillary restraint issue, Visa's claim that Dean Witter has concocted the lower courts' split relating to market power proves to be self-refuting. Visa is forced to acknowledge

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all of whom "free ride" in the strained sense Visa uses the term (Pet. 4); (ii) almost all of Visa's members issue the MasterCard card, and Visa's largest member, Citicorp, also issues both Diners Club and Carte Blanche proprietary cards (all of which Visa has long considered to be "major" competing cards) (*id.* 8, 9 & n.8; R. M653); (iii) Visa has always been willing to welcome Dean Witter as a member, but only on the condition that Dean Witter eliminate Discover as a competing proprietary card (Pet. 6; Opp. 7 n.6); and (iv) Visa passed its exclusionary bylaw with the specific intent of deterring the entry of additional competing cards and thereby inhibiting the entry and growth of competing networks (Pet. 6, 7; *see also* Briefs Amicus Curiae of American Financial Services Ass'n 4-5, and of American Express Travel Related Services Co., Inc.).

that only "*some* courts" treat market power "as a preliminary hurdle (filter or screen)," while recognizing, as the petition discusses at length, that *other* courts refuse to apply market power as a screen. Opp. 26-27 & n.29 (emphasis added). Visa also does not quarrel with the further split identified in the petition between those courts whose screen can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors, and those courts, like the Tenth Circuit below, whose screen disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market. *See* Pet. 24-26.

Instead, Visa offers only the vague and unhelpful suggestion that it is "misguided" to hope for any uniform treatment of this issue in the antitrust case law. Opp. 26. Visa's generalized pessimism, however, is hardly a sufficient reason to ignore the substantial body of circuit court case law and scholarly commentary that has discussed and deplored the disagreement and confusion that pervade the courts' treatment of the proper role and definition of market power in rule of reason cases. *See* Pet. 22-26. That is particularly so given that the current unsatisfactory state of the law can be directly attributed to the fact that the Court has never had a suitable opportunity to clarify the market power issue. *See id.* 22 & n.16.

Visa's minimal discussion of the market power authorities set forth in the petition only serves to reinforce the reality of the conflict and confusion regarding joint venture market power standards. Of all the cases on this issue addressed in the petition, the only one discussed by Visa is the Second Circuit's decision in *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993), which Visa agrees does not apply a dispositive market power screen. Opp. 27 n.29; *accord* Pet. 23. Visa's assertion that the Second Circuit's market power standard is not in conflict with that of the Tenth Circuit is powerfully refuted by the fact that in Dean Witter's substantively identical suit against MasterCard, a district

court in the Second Circuit reached a result directly opposite to that of the court below.[4] Pet. 28-29.

Finally, Visa disputes that the Tenth Circuit's application of a market power "screen" determined the outcome in this case. Opp. 23. This claim rings particularly hollow given that Visa strenuously urged the court below to adopt precisely this approach.[5] In the end Visa was successful, for the Tenth Circuit explicitly endorsed a market "screen" or "filter" approach. App. 13a. In addition, the Tenth Circuit adopted a heightened market power standard, previously suggested by a line of Seventh Circuit cases, that required Dean Witter to prove that it had been effectively excluded from the relevant market. In holding that the controlling "legal issue" was whether the challenged bylaw caused Dean Witter's "exclusion from the market," the Tenth Circuit accepted Visa's argument (repeated before this Court) that challenges to joint venture exclusions should only succeed on proof that the venture is an "essential facility." *See* App. 23a-25a & n.19; Opp. 18 & n.21. Thus, it did not matter that—as the Tenth Circuit freely acknowledged—Dean Witter showed that membership in Visa would allow it to compete "more effectively" (App. 25a) and that its membership was rejected in order to

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[4] The only other petition authorities addressed by Visa are the enforcement guidelines issued by the federal antitrust agencies. Visa asserts that Dean Witter misinterprets the enforcement policy reflected in those guidelines as being at odds with the Tenth Circuit's opinion, but it is actually Visa that mischaracterizes the guidelines. Opp. 20 & n.24; *compare* Pet. 28. Indeed, the antitrust agencies express specific concern about exclusivity requirements that, like Visa's, "increase competitors' costs." U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-10 (April 13, 1995 Supp.); *see also* Brief Amicus Curiae of American Financial Services Ass'n 6-12 (discussing anticompetitive significance of raising rivals' costs). Even if Visa's interpretation of federal enforcement policy were correct, that would be yet another source of confusion in the law and would reinforce the existence and significance of the splits of authority identified in the petition.

[5] *See, e.g.*, Brief of Appellant (10th Cir.) 42 (arguing that market power "is a threshold requirement under the rule of reason. . . . Proper application of that screen should have ended the inquiry in this case.").

"discourage price competition within Visa" (*id.* 21a).[6] According to the Tenth Circuit, any effect other than effective exclusion from the relevant market fell short as a matter of law: "Surely, if [Dean Witter's] goal is to compete *more effectively* in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." App. 25a (emphasis in original).

Because the Tenth Circuit's ruling turned on its legal definition of what constitutes market power, Visa is mistaken when it claims that "Dean Witter's case failed without regard to any particular standard of market power" because of its "failure to prove harm to competition." Opp. 26. In reversing the District Court, the Tenth Circuit did not purport to review the entire record or to apply any standard other than its own. After substituting its own "legal" market power standard ("exclusion from the market," App 18a) for the District Court's, the court below made only the limited review of the record required by that standard (*id.* 18a-19a). Finally, based on *that* review and *its* legal standard, the court concluded there was "insufficient" evidence that Visa "possessed market power." *Id.* 19a. The Tenth Circuit did not suggest that Dean Witter failed to satisfy the District Court's market power standard; and Dean Witter did not (and does not) suggest that it satisfies the Tenth Circuit's standard. Accordingly, on plenary review, the Court would be resolving a purely legal conflict.

The market power issue thus presents an important question of antitrust law about which the lower courts are deeply divided—one that will recur increasingly as joint ventures and partial integrations become ever more common. The correct result in this case hinges directly on which approach is adopted by this Court. This issue deserves plenary review.[7]

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[6] That these effects harm competition and consumers, not just a competitor like Dean Witter, is recognized by the lower courts that employ either of the two market power standards not adopted by the Tenth Circuit. *See supra*; Pet. 23-25, 27; Briefs Amici Curiae of Center for Public Interest Research, *et. al.* 4-10, of 27 National, State and Local Consumer Organizations 4-10, and of the American Financial Services Ass'n 6-12, 14-17.

[7] The additional points stated by Visa at the end of its opposition warrant only a brief response. For purposes of *certiorari*, the first and fourth points have already been addressed. The second point is simply mistaken—

CONCLUSION

The petition for a Writ of Certiorari should be granted.

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Dean Witter has consistently argued that the fact that Visa is an open joint venture that has applied its new exclusionary policy on a selective and discriminatory basis is germane to the credibility of Visa's purported justifications for its bylaw, not that this fact justifies a special legal rule. *See* Pet. 19-21. The third point is a red herring: the fact that the parties stipulated to the relevant product market did not amount to a stipulation that exclusion from 70 percent of that market cannot harm competition as a matter of law. The fifth point is also mistaken, because Visa excluded Dean Witter, in part, in order to deter other firms from issuing new proprietary cards and because the impact on other firms is relevant to Visa's market power. *See id.* 27. In addition, the briefs *amicus curiae* filed on behalf of other target firms note that the deterrent effect, which harms those firms and consumers, also harms Dean Witter because other issuers are prevented from issuing new proprietary cards on Dean Witter's network. *See* Briefs Amicus Curiae of the American Financial Services Ass'n 4-5, and of American Express Travel Related Services Co., Inc.